IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-21-00985; 00986; 00987; 00988; 00989

DIRECTOR OF PUBLIC PROSECUTIONS

v

Bradbury Industrial Services Pty Ltd (under administration)

JUDGE:	His Honour Judge Rozen
WHERE HELD:	Melbourne
DATE OF HEARING:	14 June 2023
DATE OF SENTENCE:	23 June 2023
CASE MAY BE CITED AS:	DPP v Bradbury Industrial Services P/L (under administration)
MEDIUM NEUTRAL CITATION:	[2023] VCC 1029

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW
Catchwords:	Chemical waste recycling company – fire at one premises – caused pollution - 5 other premises storing dangerous goods not compliant with safety regulations - Offences against the *Dangerous Goods Act 1985* (Vic), *Occupational Health and Safety Act 2004* (Vic) - rolled up charge under s 21(2)(e), and the *Environment Protection Act 1970* (Vic) – Inadequate training and supervision – Chemical fire – Objective gravity – Consequences of risk – Correct approach to sentencing for offences against s 31 of the *Dangerous Goods Act 1985*.
Legislation Cited:	*Dangerous Goods Act 1985* (Vic); *Occupational Health and Safety Act 2004* (Vic); *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic); *Environment Protection Act 1970* (Vic)
Cases Cited:	*DPP v Frewstal Pty Ltd* (2015) 47 VR 660; *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55; *Midfield Meat International Pty Ltd v R* [2023] VSCA 106;*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; *Chugg v Pacific Dunlop Ltd (No 2)* (1999) 3 VR 934; *Dotmarr EPP Pty Ltd* [2015] VSCA 241; *DPP v Hazelwood Pacific Pty Ltd & Ors* [2020] VSC 229; *DPP v Walsh* [2018] VSCA 172; *Mills v R* (1988) 166 CLR 59; *DPP v Conos* [2021] VSCA 367
Sentence:	Fine – $2,980,000 – s 6AAA declaration – Fine of $4,000,000

APPEARANCES:	Counsel	Solicitors
For the DPP	Mr A. Palmer KC & Ms M. Brown	Office of Public Prosecutions
For the Accused	Garry Livermore KC & David Oldfield	Kennedys Law

HIS HONOUR:

1 Bradbury Industrial Services Pty Ltd (**Bradbury**) was a chemical waste recycling company. In 2019, Bradbury operated a warehouse at 16-18 Thornycroft Street, Campbellfield. This address was also the registered office of the company. Bradbury was an "occupier" of the Thornycroft Street warehouse for the purposes of the *Dangerous Goods Act 1985* (Vic) (the **DG Act**).

2 Bradbury was also an occupier of warehouses located at the following addresses:

(a) 9-11 Brooklyn Court, Campbellfield;

(b) 20A Yellowbox Drive, Craigieburn;

(c) 20B Yellowbox Drive, Craigieburn;

(d) 12 Yellowbox Drive, Craigieburn; and

(e) 1745 Sydney Road, Campbellfield.

3 At the relevant time, Bradbury was also an 'employer' within the meaning of section 5 of the *Occupational Health and Safety Act 2004* (Vic) (the **OHS Act**). Bradbury's employees included Vigneshwaran Varatharaj and Sedat Pir.

4 The prosecution case against Bradbury comprises allegations in relation to all six premises:

(a) In relation to the Brooklyn Court, Yellowbox Drive and Sydney Road premises, that as an occupier of premises in which dangerous goods were stored, it failed on various dates between 31 January 2019 and 15 March 2019 to take all reasonable precautions, contrary to section 31(1) of the DG Act (**charges 1, 2, 3, 4 and 5**). The maximum penalty is 9,000 penalty units. At the date of the offence a penalty unit was valued at $161.19. Therefore the maximum fine that may be imposed in respect of charges 1-5 is $1,450,710.

(b) In relation to the Thornycroft Street premises, that on 5 April 2019, it failed to provide the instruction, information, supervision and training that were necessary for employees to perform their work safely, contrary to section 21(1) and 21(2)(e) of the OHS Act (**charge 6**). The maximum fine that may be imposed in respect of charge 6 is also $1,450,710.

OHS Act Offending

5 Although the DG Act offences occurred earlier than the fire which gives rise to the OHS Act charge, it is convenient to deal with the OHS Act charge first as there is no dispute about the sentencing principles which the Court should apply.

Factual Background

6 The following factual summary is drawn from the Summary of Prosecution Opening for Plea[1] which it was agreed at the plea was the agreed basis for sentencing in this case.

7 Bradbury operated waste solvent processing and recycling facilities in Melbourne from 2006. Initially Bradbury conducted this business at Merola Way before moving to a site at 16-18 Thornycroft Street, Campbellfield in 2015.

8 The Thornycroft Street warehouse was a single storey commercial warehouse, divided into two halves. The front half of the warehouse was used to store containers for new product. The back half was used for storage and sorting of waste. The two sections were separated by a concrete wall and sliding panel door. During normal operations the fire door between the two warehouse sections remained open.

[1] Exhibit P1.

9 Drivers would collect waste, including flammable industrial waste such as oil, petrol and paint solvents, from Bradbury's customers and deliver it to the warehouse. The waste would then be sorted and recycled.

10 Once waste had been sorted, it would be pumped using pneumatic pumps into Intermediate Bulk Containers (**IBCs**).[2] Those pneumatic pumps were specially designed for solvents.

11 On the morning of 5 April 2019, there were 136,420 litres of chemicals on site. The majority of the chemicals were Class 3 solvents. Class 3 is the class of dangerous goods allocated to flammable liquids.

12 On that day, Bradbury employee Vigneshwaran Varatharaj was required to decant Toluene from a 1000 litre IBC into a 60 litre drum. Toluene is a Class 3 Dangerous Good, and a 'static accumulator' (meaning it is susceptible to a build-up of electrostatic charge).

13 When decanting flammable liquids, the liquids can become electrostatically charged while flowing past the walls of pipes or vessels. Static generated by liquids may give rise to a fire or explosion risk if ignitable mixtures are present. Conducting parts of installations liable to become electrostatically charged should be earthed or bonded.

14 Mr Varatharaj had been shown how to decant chemicals, including using pumps and 'L clamps'. He was aware of the risk of fire when handling dangerous goods but was not aware that static could cause fire, and was never taught to earth containers before filling them.

15 Mr Varatharaj began to decant in the stacking area in the front half of the warehouse. He would sometimes use the stacking area for decanting if he only needed to decant smaller drums, instead of using the pneumatic pumps.

16 CCTV footage from the warehouse captured the incident. The footage was shown in court. It shows Mr Varatharaj using a forklift to position a white IBC above a blue 60 litre drum. He then used the forklift to lower the IBC so that the pouring elbow was aligned with the drum filler hole. He then turned on the tap to start the flow of

[2] An IBC is a specially designed plastic contained for the storage of goods with a capacity of 1000 litres.

toluene. The IBC was not earthed at the time and there was no earthing strap between the drum and the IBC. It is not possible from the CCTV footage to determine if the drum and the IBCs were bonded.

17 Shortly after Mr Varatharaj turned on the tap, there was a large flash and a fire began to burn. Mr Varatharaj felt burning on his face. He fled the scene.

18 The fire quickly spread out of control and resulted in the warehouse being destroyed. The fire was attended by large numbers of fire fighters and took four days to extinguish and required the closure of several nearby schools.

WorkSafe Investigation

19 WorkSafe inspectors attended the Thornycroft Street warehouse on the day of the incident, along with members of Victoria Police, the Environment Protection Authority and the Metropolitan Fire Brigade. WorkSafe inspectors attended the warehouse on several subsequent days.

20 John Kelleher, an expert in fires and explosions, examined the workplace on 9 April 2019. Mr Kelleher was of the view the electrostatic discharge was the most likely source of the ignition.

21 Bradbury is charged that it failed to provide such information, instruction, training or supervision to employees as was necessary to reduce risk to health by failing to:

(a) Provide dangerous goods training for all employees that worked with dangerous goods;

(b) Give specific instructions about a safe procedure for decanting dangerous goods;

(c) Supervise employees that were required to handle dangerous goods to ensure the safe procedure was being followed; and

(d) Ensure that employees that worked with dangerous goods were familiar with the risks of fire and/or explosion from electrostatic charge.

Victim Impact

22 Mr Varatharaj was ultimately taken to the Alfred Hospital. He sustained burns to his face and throat and spent three days in hospital. He also sustained a shoulder injury. Another employee, Sedat Pir, was taken to the Eye and Ear Hospital.

23 Mr Varatharaj made a Victim Impact Statement dated 8 June 2023.[3] He describes his disturbed sleep and the ongoing effects of the fire. He explains that he has consulted 'psychologists and doctors'. He states that he has a lot of anger about what happened.

Sentencing Principles

24 The principal consideration in determining the appropriate sentence in a prosecution under the OHS Act is the objective seriousness of the offending. That in turn requires consideration of the gravity of the breach of duty owed under the OHS Act and is not assessed according to the result or consequences of the breach.

25 The gravity of the breach is measured by two factors:

(a) The extent to which the defendant has departed from its statutory duty; and

(b) The extent of the risk of death or serious injury which might result from the breach.

26 An assessment of the extent of the risk itself involves consideration of two factors:

(a) The likelihood of the occurrence of an event as a result of the breach (such as the event that occurred in the particular case) endangering the safety of employees or others; and

[3] Exhibit P3.

(b) The potential gravity of the consequence of such an event (in particular, whether there is a risk of death or serious injury).

27 The fact that the breach in the particular case resulted in death or injury is relevant in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to health or safety resulting from the breach.[4]

28 Finally, the occurrence of any death or injury 'is a matter which must be taken into account in assessing victim impact'.[5]

29 Bradbury is charged that it contravened s 21(1) and (2)(e) of the *OHS Act* on one day only, being 5 April 2019. Presumably that date was chosen because it was the date of the fire. However, causing the fire is not an element of the charge to which Bradbury has pleaded guilty. It was Bradbury's failure to ensure that Mr Varatharaj was informed about, and instructed and trained in respect of, the identified risk of a fire resulting from static electricity and the way in which that risk could be eliminated that is the relevant omission, together with a failure to supervise his work to ensure he was following any such instruction and training.[6]

30 According to submissions filed on behalf of Bradbury, Mr Varatharaj had been decanting flammable liquids including Toluene at this site in a 'dedicated role' from about April 2017.[7] It is common ground that he had never been trained in respect of the risk of fire and/or explosion from electrostatic charge although he had received other relevant training.

31 That being the case, and despite the charge specifying that the date of the fire was the date of the breach of the Act, it appears that the relevant risk to safety arising

[4] *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [127]; *Midfield Meat International Pty Ltd v R* [2023] VSCA 106, [174].
[5] *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55, [200].
[6] Cf. *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [40]-[41].
[7] Outline of Defendant's Plea Submissions dated 12 June 2023, [7(iv)].

from the inadequate information, instruction, training and supervision was present from April 2017 until 5 April 2019.[8]

32 The charge is particularised that Bradbury failed to provide the training to '*all employees* that worked with dangerous goods'.[9] In response to a question from the bench during the plea hearing, Mr Palmer KC, who appeared with Ms Brown for the prosecution, clarified that the case against Bradbury is limited to deficiencies in the training, etc of Mr Varatharaj. It appears that other employees had been trained in the risk of fire being caused by electrostatic charge. The reason why this training had not been provided to Mr Varatharaj, despite the 'dedicated role' he performed, is unclear.

33 Bradbury contended that its offending 'falls into a category that is less serious' as this is not a case involving a 'clear disregard for the safety of workers'.[10] Bradbury sought to distinguish its circumstances from cases where the accused employer had failed to establish an adequate safety system at all. Referring to an observation by Maxwell P in the case of *CICG*,[11] counsel for Bradbury characterised its breach of the OHS Act as one which resulted from a failure to *adhere* to *systems put in place* by management.

Consideration of Objective Seriousness

34 I do not accept that Bradbury's submissions accurately characterise its breach. While there may have been other methods of filling containers employed by Bradbury that were safe, the agreed fact is that the employee doing the work had never been trained about the need to earth containers before filling them.[12] The task was a regular part of his work. This is not a case of an employee failing on a single occasion to adhere to a system of work put in place by her or his employer.

[8] Cf *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [40]-[41].
[9] See charge 6, particular 5(a) (emphasis added).
[10] Outline of Defendant's Plea Submissions dated 12 June 2023, [17].
[11] *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181, [31].
[12] Exhibit P1, [26].

35 But even if one was to accept Bradbury's characterisation of the breach, it does not follow that such a breach is in the 'less serious' category. Such an approach devalues the importance of the obligation imposed by s 21(2)(e) of the OHS Act which has been described in the Court of Appeal as a 'foundational safety obligation of employers'.[13]

36 The duty imposed by s 21(2)(e) of the OHS Act is not qualified by 'reasonable practicability'. The only qualification on the duty is that an employer do what is 'necessary' to enable its employees to work safely. What will be 'necessary' will depend on all of the circumstances including the nature of the work and the employer's business.[14]

37 Where an employer requires its employees to transfer flammable liquids from one container to another, the risk of a fire is an obvious one. Where the activity takes place in a warehouse storing in excess of 130,000 litres of dangerous goods of which the majority were flammable liquids, the risk is not only obvious but extreme. Such an employer would be expected both 'to have knowledge of the hazards and risks associated with'[15] such a task having regard to the nature of its business and to take every reasonably practicable precaution open to it to eliminate those risks.[16] Ensuring the relevant staff are appropriately trained and supervised may be considered to be the very least it could do in this regard.

38 The relative importance of the duty to provide a safe system of work on the one hand, and the duty to provide necessary training, etc on the other, is illustrated by the case of *Vibro-Pile*.[17] The Court of Appeal imposed a fine of $250,000 in respect of the former charge and $500,000 in respect of the latter.[18] In each case the then

[13] *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [32]; see also *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181, [44].
[14] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, [11].
[15] *Chugg v Pacific Dunlop Ltd (No 2)* (1999) 3 VR 934, [134].
[16] OHS Act, s 20(1).
[17] *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55.
[18] *Ibid*, [238].

applicable maximum penalty was $1,075,050. The fine imposed for the s 21(2)(e) charge represented approximately 46% of the maximum.

39 As noted Bradbury submitted that its breach did not involve a 'blatant disregard' for worker safety. However, this does not mean the case is to be assessed as a lower level breach. The Court of Appeal in *Vibro-Pile* accepted that that case did not involve 'blatant disregard' for worker safety.[19] So too did the Court of Appeal in the very recent case of *Midfield Meat International.*[20] There the Court upheld a fine of $400,000 for a single breach of the OHS Act describing it as 'well within the applicable range'.[21]

40 It is also significant to the present case that the sentencing Judge in *Midfield* accepted that the likelihood of the particular risk eventuating was 'relatively rare' but the consequences if it did eventuate were 'catastrophic'.[22] The Court of Appeal considered that the breach was appropriately characterised as serious.[23]

41 In the present case, I consider that the lack of training meant that the risk of a fire or explosion was clearly a possibility that was more than remote. Further, the presence of large quantities of flammable liquids at the premises meant that, in the event of a fire or explosion, the potential consequences were catastrophic as the actual outcome on 5 April 2019 amply demonstrated.

42 A further significant feature of the breach is that, in November 2015 Bradbury was issued an improvement notice by a WorkSafe inspector that concerned its compliance with reg 43 of the *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic) at the Thornycroft Street premises.[24] The inspector who

[19] *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55, [233].
[20] [2023] VSCA [106], [201].
[21] *Midfield Meat International Pty Ltd v R* [2023] VSCA 106, [205]. The fine represented approximately 28% of the maximum available penalty which was $1,427,130.
[22] *Ibid*, [172].
[23] *Ibid*, [201].
[24] Reg 43 provided that: 'An occupier of premises where dangerous goods are stored and handled must ensure that, so far as is reasonably practicable, ignition sources are not present in any hazardous area within the premises'. The 2012 regulations were repealed and replaced in 2022.

issued the notice informed Bradbury that its hoses used to transfer flammable liquids 'could result in the generation of electrostatic electricity which could lead to fire or explosion'.[25] This was the very risk that manifested on 5 April 2019. Bradbury was required to provide evidence that the hoses were tested for electrical continuity which it subsequently did.

43 The Court of Appeal has observed that prior notice of a risk is relevant to sentencing in a case such as this. For example, in *Frewstal* the employer had been issued an improvement notice concerning a related risk four years before the date of the offence. Maxwell P considered that the notice had put the company on notice about its statutory obligations under the OHS Act 'in the most explicit terms'.[26] Receipt of the notice increased the employer's culpability.[27]

44 For these reasons, I consider that Bradbury's culpability is high. This was a serious breach of the OHS Act despite the relatively minor injuries sustained by Mr Varatharaj.

45 The Court of Appeal has also emphasised that general deterrence is of particular importance in sentencing for offences such as this one. The sentence imposed must 'draw attention to the importance of workplace safety, and… send a message to employers that failure to eliminate or mitigate safety risks will attract significant punishment'.[28]

46 As noted, Bradbury is charged with a single charge of contravening s 21(1) and (2)(e) of the OHS Act. As this section 'imposes a variety of distinct obligations, each requiring the employer's separate attention',[29] charge 6 is properly to be considered a rolled up charge comprising four separate offences. In sentencing for such a charge, a court will strive to reflect the overall criminality although a single

[25] Depositions, 7876.
[26] *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [20].
[27] *Ibid*, [27]; see also *Dotmar Epp Pty Ltd* [2015] VSCA 241, [25]-[26].
[28] *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55, [233].
[29] *Ibid*, [142].

maximum penalty applies. Generally speaking, 'a significantly higher sentence is justified on a rolled-up charge than would be the case for a single offence'.[30] However, it is necessary to acknowledge that there is considerable overlap between what Bradbury was required to do, for example, to 'inform' its employees, 'instruct' its employees and what it was required to do to 'train' them.

Current Sentencing Practices

47 The Court's attention was drawn by the prosecution to a number of cases heard in this court or on appeal from this court which were said to be relevant comparators for the purposes of assessing current sentencing practices under s 5(2)(b) of the *Sentencing Act 1991* (Vic).[31] The features of the cases that made them so according to the prosecution were those set out at para [23] of its submissions. In summary, most involved pleas of guilty by employers with no prior convictions to charges under both s 21(2)(a) and s 21(2)(e).

48 I have looked at each of the cases and have taken them into account as one aspect of the instinctive synthesis task. Previous cases are not precedents and each case must be sentenced having regard to its own facts and the circumstances of both the offence and the offender.[32] Having said that, one of the cases which, like the present, involved a charge under s 21(2)(e) without a charge under s 21(2)(a) as well, was of assistance. Like Bradbury, the employer had no prior convictions and had various safety measures and systems in place.

49 In the case of *Pipecon,*[33] the accused employer had a safe system of work for trenching and pipe-laying work but it failed to supervise its employees to ensure they followed the system on a particular occasion. Two of its employees died in a

[30] *DPP v Conos* [2021] VSCA 367, [75].
[31] The cases are *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131; *DPP v Eliot Engineering Pty Ltd* [2014] VCC 266; *DPP v City Circle Recycling Pty Ltd* [2015] VCC 480; *DPP v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676; *DPP v Pipecon Pty Ltd* [2021] VCC 1808; and *DPP v Peter Stoitse Transport Pty Ltd* [2022] VCC 870.
[32] *Director of Public Prosecutions v Dalgleish (a pseudonym)* [2017] HCA 41, [9], [82]-[83].
[33] *DPP v Pipecon Pty Ltd* [2021] VCC 1808

trench collapse on that occasion. It pleaded guilty to a single charge under s 21(2)(e) and was fined $550,000 (which was approximately 39% of the then available maximum of $1,427,130).

DG Act Offending

50 The factual basis upon which Bradbury is to be sentenced for the five DG Act charges is also set out in the agreed factual summary. The following is drawn from that document.

51 Bradbury stored large quantities of dangerous goods at each of the Brooklyn Court, Yellowbox Drive and Sydney Road warehouses, without taking the precautions required under the DG Act as specified in the *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic).

52 The prosecution relies on the expert opinions expressed by Andrea Rowe, General Manager of Safety Action Pty Ltd, about the manner in which the dangerous goods were stored and the risks posed by the storage of dangerous goods at each of the warehouses.

9-11 Brooklyn Court, Campbellfield

53 On 31 January 2019, WorkSafe inspectors attended the premises at 9-11 Brooklyn Court Campbellfield for the purpose of establishing whether dangerous goods (as defined in the DG Act), were being stored there.

54 The premises were a rendered brick warehouse with a metal roof and fibre glass skylights. The inspectors observed 2,134 IBCs stacked three high and filling the warehouse. The IBCs contained dangerous goods, namely burner fuel, a Class 3 flammable liquid. Some of the IBCs were showing indications of damage, bulging or leaking. The total quantity of this product was estimated to be in excess of 2 million litres.

55 Ms Rowe was subsequently engaged by WorkSafe to provide an expert opinion regarding the adequacy of the leased warehouse and the storage of dangerous goods at Brooklyn Court, taking into account the OHS Act, DG Act, codes, industry practice and Australian Standards.

56 Ms Rowe attended the Brooklyn Court premises on 7 May 2019 and later produced a report.[34] In her opinion, the warehouse was not suitable for the storage of that volume of flammable liquids and posed considerable risk to the public, neighbouring premises and firefighters. There was a risk of fire at the site, which would be significant given the volume of dangerous goods and the conditions in which they were stored.

57 Bradbury failed to take the following precautions to prevent a fire or explosion:

(a) The premises were "not adequate" for the storage of 2,134,000L of flammable liquids;

(b) There was no evidence of a fire protection system adequate for the quantity of dangerous goods stored at the premises;

(c) The premises did not have adequate spill containment;

(d) Ignition sources were present including electrical switchboards, lighting and possibly forklifts;

(e) The premises had inadequate ventilation, creating a hazard due to the quantity of flammable liquids and low flash point; and

(f) The IBCs were stacked three high, which is not permissible unless purpose built racking is installed.

[34] It was not contended by the defence that what Ms Rowe observed on 7 May 2019 was irrelevant to the charge which is concerned with the state of the premises on 31 January 2019.

12, 20A and 20B Yellowbox Drive, Craigieburn

58 On 8 March 2019, WorkSafe inspectors attended each of the premises at Yellowbox Drive Craigieburn. The three Yellowbox Drive warehouses were made of precast concrete with steel roofs and fibreglass skylights.

59 Liquid residue was observed by the inspectors on the floor of each of the premises, presumed to have leaked from the IBCs. The total volume of dangerous goods stored onsite was estimated to be between three and nine million litres.

60 Ms Rowe was engaged by WorkSafe to make a similar assessment for the three Yellowbox Drive premises as she had undertaken previously at Brooklyn Court. She attended each of the premises on 9 September 2019[35] and subsequently produced a report in which she identified similar deficiencies to those present at the Brooklyn Court site.

61 These deficiencies included a lack of adequate fire protection, inadequate spill containment, ignition sources present, inadequate ventilation, lack of segregation of incompatible dangerous goods, unsafe stacking of IBCs and IBCs that were damaged and leaking.

1745 Sydney Road, Campbellfield

62 On 15 March 2019, WorkSafe inspectors attended the premises at 1745 Sydney Road, Campbellfield. The Sydney Road premises was located in a built-up commercial area with workers performing work in adjacent properties. The building was made of steel with fibreglass skylights.

63 The inspectors observed IBCs stacked four high in places, incompatible classes of dangerous goods stored in close proximity to each other, and containers of

[35] It was not contended by the defence that what Ms Rowe observed on 9 September 2019 was irrelevant to the charge which is concerned with the state of the premises on 8 March 2019.

dangerous goods that appeared to be damaged and leaking. The total volume of dangerous goods stored onsite was estimated to exceed 5 million litres.

64 Ms Rowe was engaged by WorkSafe to undertake a similar assessment of the Sydney Road premises as the assessment she had made in relation to the other premises occupied by Bradbury.

65 Ms Rowe attended on 18 June 2019,[36] and identified similar deficiencies including a lack of adequate fire protection systems, a lack of adequate spill containment, ignition sources present, inadequate ventilation, insufficient segregation of incompatible dangerous goods, unsafe stacking of IBCs and IBCs that showed swelling, leaking and damage.

66 Those facts make up charges 1-5.

Sentencing Principles

67 The parties disagreed about the correct approach to sentencing under s 31 of the DG Act.

Prosecution Submissions

68 The Director submits that s 31 creates a series of 'risk-based' offences akin to those created by s 21 of the OHS Act. On that basis, according to the Director, the applicable sentencing principles are those described above. In particular, in the assessment of the objective seriousness of a given breach of s 31, the Director submits that 'the fact that the risks did not eventuate does not make the contraventions less serious'.[37]

69 Applying this analysis to the DG Act charges before the court, the Director submits that the offending is objectively 'very serious'.

[36] It was not contended by the defence that what Ms Rowe observed on 18 June 2019 was irrelevant to the charge which is concerned with the state of the premises on 15 March 2019.
[37] Director's Sentencing Submissions dated 6 June 2023, [40(d)].

70 Further, the Director urges the court to infer that the failure to comply with the statutory requirements 'was likely to have been motivated by a desire to avoid incurring the cost of taking the precautions'. Such a 'deliberate choice to privilege commercial considerations over safety concerns' should, the Director submits, 'place the Accused's contraventions at the highest levels of seriousness'.[38]

Defence Submissions

71 Bradbury takes issue with both aspects of this analysis.[39]

72 In relation to sentencing principles to be applied, it contends that the Director's argument should be rejected by the court because the offence created by s 31 of the DG Act is quite different to that created by s 21 of the OHS Act. Whereas the latter is concerned with risk, the former is concerned with outcome. Bradbury contends that the objective seriousness of an offence under s 31 of the DG Act 'involves a consideration of the likelihood of the risk eventuating …, the particular failures of the accused … and the seriousness of the consequences'. [40]

73 Applying those principles to charges 1-5, Bradbury contends that its conduct is 'lower-level' offending akin to breaches of the *Dangerous Goods (Storage and Handling) Regulations 2012* (Vic). Such offences don't require proof of a fire or explosion and attract a maximum penalty of 500 penalty units.[41]

74 Bradbury also challenges the Director's contention that it was motivated to offend by reason of commercial gain as 'contrary to well-established principle'.[42] I will deal with that issue after first examining the nature of the liability imposed by s 31 of the DG Act.

[38] Director's Sentencing Submissions dated 6 June 2023, [45].
[39] In pre-trial submissions it had contended that a fire or explosion was an element of the offence created by s 31(1)(a)(ii) of the DG Act. Those submissions were abandoned upon Bradbury pleading guilty – see Director's Sentencing Submissions dated 6 June 2023, [27].
[40] Outline of Defendant's Plea Submissions dated 12 June 2023, [66].
[41] *Ibid*, [68].
[42] *Ibid*, n 27.

75 Neither party was able to refer the court to any previous decisions in which the nature of the offences created by s 31 of the DG Act have been considered despite the Act having been in force for many years.

76 The nature of the offences created by s 31(1) is to be ascertained from an examination of the statutory language and its context.

77 Section 31(1) relevantly provides:

> An occupier or person in charge of premises where dangerous goods are manufactured, stored or sold, … —
>
> (a) must take all reasonable precautions for the prevention of—
>
> (i) tampering, theft or unauthorized access;
>
> (ii) any fire or explosion;
>
> (iii) any leakage; or
>
> (iv) any damage to property or danger to the public incurred by an accident—
>
> involving dangerous goods in the ownership, control or possession of that person; …
>
> Penalty: If the failure results in death or serious injury to a person—
>
> (a) in the case of a natural person, 1800 penalty units or imprisonment for 2 years; or
>
> (b) in the case of a body corporate, 9000 penalty units.
>
> In any other case—
>
> (c) in the case of a natural person, 1800 penalty units; or
>
> (d) in the case of a body corporate, 9000 penalty units.

78 The provision requires an occupier of premises where dangerous goods are stored to 'take all reasonable precautions for the prevention of' various identified consequences. 'Dangerous goods' are inherently hazardous to life and it is therefore necessary to impose onerous obligations on anyone in control of such goods.

79 The duties imposed by s 31 give effect to the following statutory objectives set out in s 4 of the DG Act:

> (a) to promote the safety of persons and property in relation to the manufacture, storage, transport, transfer, sale and use of dangerous goods and the import of explosives into Victoria;
>
> (b) to ensure that adequate precautions are taken against certain fires, explosions, leakages and spillages of dangerous goods and that when they occur they are reported to the emergency services and the inspectors without delay;
>
> …
>
> (d) to allocate responsibilities to occupiers and owners of premises to ensure that the health and safety of workers and the general public is protected;

80 These objectives and the language in which they are couched are similar to the equivalent objectives of the OHS Act.[43] Both statutes are concerned with promoting health and safety.

81 Although it is correct to observe, as Bradbury does, that the language of s 31 of the DG Act differs from that used in s 21 of the OHS Act, that may have more to do with the historical antecedents of the DG Act[44] than with an intent of the drafter to create offences which are not risk-based.

82 Further, the differences in language may be more apparent than real. The DG Act provision requires a duty holder to 'take all reasonable precautions for the prevention' of defined outcomes such as fire and explosion. The OHS Act requires a duty holder to maintain a working environment that is 'so far as is reasonably practicable' safe and without risk to health.

83 The word 'precaution' is defined as a 'measure taken beforehand to avoid a danger'.[45] 'Danger' is a synonym of 'risk'. It seems clear that both statutes require

[43] See s 2; see also the 'principles of health and safety protection' in s 4 of the OHS Act.
[44] The DG Act repealed and replaced a number of Acts which regulated what are now defined as 'dangerous goods. One of the repealed Acts was the *Inflammable Liquids Act 1966* (Vic). Section 17 of that Act imposed a duty to take 'reasonable precautions'.
[45] New Shorter Oxford English Dictionary.

those people who are in a position to reduce risks associated with their undertakings to do so.

84 Bradbury submits that 'the fact of an explosion or fire and its consequences is highly relevant to the exercise of the sentencing discretion'.[46] This may be accepted but it does not follow that a contravention that does not result in a fire or explosion is necessarily low level. The characterisation of a given breach will turn on its objective seriousness. Often whether a fire or explosion results is a matter of chance as this case reveals.

85 Bradbury submits that its proposed construction is 'confirmed by the s 31 DG Act penalty provision, which unlike the OHS general duty provision provides for specific penalties where the contravention results in serious injury or death'.[47] However, for a corporate offender such as Bradbury there is no difference in the maximum penalty even where the offence has this result.[48] If anything the penalty structure in s 31 supports the construction urged on the Court by the Director.

86 Finally, if Bradbury's preferred construction of s 31(1) of the DG Act is correct, a breach of s 31(1)(a)(i) in which an occupier of premises where explosives were stored left the gate unlocked, would be considered low level. But the same breach where a third party walked through the unlocked gate and stole the explosives would be a serious breach of the duty. This is unlikely to be the correct approach to sentencing for the s 31 offence. Rather, the seriousness of that hypothetical breach would be assessed by reference to how long the gate had been unlocked, how accessible the premises were and the possible consequences if the explosives were stolen or interfered with. Such an approach would be consistent with the risk-based nature of s 31.

[46] Outline of Defendant's Plea Submissions dated 12 June 2023, [63].
[47] Outline of Defendant's Plea Submissions dated 12 June 2023, [63].
[48] See ss 31(b), (d).

87 I accept the submissions of the Director. In my view, an assessment of the objective seriousness of a contravention of s 31(1)(a)(ii) of the DG Act is determined by the extent of the accused's failure to meet its duties and the extent of the risk thereby created. That the risk did not manifest in a given case does not of itself reduce the seriousness of the contravention. If the risk does manifest, that is a matter to be taken into account as part of the instinctive synthesis. The analogy with sentencing under the OHS Act is a sound one in my view.

Profit ahead of Safety?

88 As noted earlier, the prosecution submitted that Bradbury's failure to take the required precautions in respect of the storage of these very large quantities of dangerous goods 'cannot have been accidental'. It was submitted that the court could infer that the offending 'was likely to have been motivated by a desire to avoid incurring the cost of taking the precautions' and represented 'a deliberate choice to privilege commercial considerations over safety concerns'. According to the prosecution, this placed the contraventions at 'the highest level of seriousness'.[49]

89 Mr Oldfield, counsel for Bradbury, opposed any such finding and pointed out correctly that any aggravating feature of the offending must be established by the prosecution on the criminal standard of proof. He submitted that I cannot be satisfied beyond reasonable doubt that Bradbury's managers were aware of their obligations. In those circumstances, I can't infer that they deliberately disregarded those obligations in pursuit of profit.

90 On balance, I accept that it might be inferred that the managers of a large company specialising in storing dangerous goods are aware of its legal obligations under the regulations. This inference is strengthened by the Thornycroft Street warehouse being largely compliant with those very obligations at the time the other

[49] Director's Sentencing Submissions dated 6 June 2023, [45].

five premises were not. However, in the absence of evidence supporting the submissions made by the prosecution I cannot exclude other reasons for a lack of compliance such as the company, now under administration, not being able to afford the expenditure involved.

91 It was open to the prosecution to adduce evidence in support of its submission but it did not. Alternatively it could have obtained Bradbury's agreement and included a reference to this in the agreed statement of facts. This also did not occur.

92 In those circumstances, I am not satisfied beyond reasonable doubt that Bradbury necessarily privileged commercial gain over safety.

93 However, even putting that matter to one side, I accept the prosecution's submissions that these five contraventions are very serious examples of DG Act offending. I reach this conclusion based primarily on the degree of risk of fire or explosion at each of the five premises. This is in turn informed by the following features of the offending:

(a) The very large quantities of flammable dangerous goods stored at the premises (between 10 and 16 million litres);

(b) The unsuitability of the premises for the storage of such goods in these quantities;

(c) The presence of ignition sources at the premises such as switchboards, lighting and possibly forklifts;

(d) The inadequate ventilation; and

(e) There being no evidence of a fire protection system adequate for the quantity of dangerous goods stored.

94 Perhaps the best way to understand the degree of risk of fire and the potential consequences in the event of a fire is to compare each of the five premises with

the premises where the fire actually occurred giving rise to charge 6. That fire destroyed the warehouse, injured the employees and took four days to extinguish all the while causing several schools to shut. The quantity of dangerous goods at each of the five premises far exceeded the quantity at the Thornycroft Street warehouse. Further, there was a compliant fire protection system installed at Thornycroft Street.

95 It does not take a great deal of imagination given that evidence to contemplate the likely impact of a fire at one of the five premises the subject of the DG Act breaches. The warehouses were located in suburban locations surrounded by businesses and residences.

96 I therefore accept the submission of Mr Palmer and Ms Brown that the DG Act breaches are more serious than the OHS Act breach. I reject the defence submission that the DG Act breaches are 'observational breaches' akin to contraventions of the relevant regulations.[50]

97 Finally, in determining the appropriate penalties to be imposed I have taken into account that charges 2, 3, and 4 relate to premises that were all in Yellowbox Drive Craigieburn. While the three charges are separate, the principle of totality requires the court to determine a penalty that reflects Bradbury's overall criminality. I have imposed an aggregate fine in relation to charges 2-4 for this reason.

EP Act Offending

Breach of licence condition (charge 1)

98 As noted earlier, at the Thornycroft Street premises Bradbury conducted a commercial undertaking, including the receiving, storage and processing of solvent and other industrial waste. Pursuant to section 20 of the EP Act that undertaking

[50] Outline of Defendant's Plea Submissions dated 12 June 2023, [68].

required a licence, and accordingly, licence number 100771 (**the licence**) had been issued to Bradbury on 17 April 2014.

99 One of the conditions to which the licence was subject was that Bradbury was prohibited from storing more than 154,000 litres of liquid waste at the premises.

100 On 13 March 2019 EPA Authorised Officers inspected the premises to sample burner fuel and calculate the volume of liquid waste stored there. They observed approximately 450 completely or partly filled 1,000 litre IBCs containing burner fuel and other liquid waste at the premises. Although the exact amount of liquid waste stored at the premises is unknown, it is agreed that it exceeded that permitted by the licence.

Pollution from the Fire (charges 2 & 3)

101 EPA Investigator Jason Hannon arrived at the scene of the fire at approximately 8.30am on 5 April 2019. He observed that fire had engulfed the building. He observed firewater draining from the premises and into the stormwater network, leaving behind a stained residue.

102 Melbourne Water Response Officer Ryan Hemmens investigated the impacts of the fire on the nearby waterways on the day of the fire. He observed downstream from the premises "a dark turbid brown colour on the surface of the water indicating…the possible presence of hydrocarbons", and noticed a distinct chemical smell when standing about 10 metres away from the top of the bank.

103 On the day of the fire and in the days following, other EPA officers observed water pollution in the waterways, including blue/green staining in the vicinity of the premises.

104 Various water samples were taken on 5, 6 and 9 April and 3 May from four sites in Merlynston Creek downstream from the fire. The results of the sampling were considered by Paul Leahy, Associate Principle Expert for Inland Water and Senior

Freshwater Scientist in the Applied Sciences Directorate at the EPA. In Mr Leahy's opinion, the discharge of fire waste water from the premises into nearby waterways was limited to the first two downstream sites.

105 The first downstream site is known as Foden Reserve. It is a concrete retarding basin that is designed to intercept stormwater pollutants. The second downstream site is known as Merlynston Creek at Railway Bridge. This is a location where the stormwater drainage system 'daylights' and runs south underneath a rail bridge before re-entering the underground stormwater system.

106 Mr Hemmens describes this area as an open earth channel with a heavy infestation of Typha. Mr Leahy describes this area as a degraded urban waterway that has been subject of severe and repeated polluting events since the 1970s, including in 2017 when a large chemical fire occurred at a waste recycling plant located immediately adjacent to the site.

107 Mr Leahy opines that the Merlynston Creek at the Rail Bridge is of ecological value in that it is suitable to sustain aquatic life such as fish, insects and worms. However, the severe and repeated pollution events in the creek, including the discharge in April 2019, has compromised efforts to improve water quality in the creek.

108 As noted earlier, the expert evidence is that the cause of the fire was the ignition of Toluene during the decanting process, and that the most likely source of ignition was an electrostatic discharge.

Objective Gravity

109 The parties were agreed on the correct approach to sentencing under the EP Act.

110 The primary consideration is the objective gravity of the breaches. As most of the offences against the EP Act are outcome-based and not risk-based, it is necessary in evaluating objective gravity to consider both the 'occurrence, extent and

duration' of the pollution caused and the 'culpability and responsibility' of the offender.[51]

111 General deterrence is clearly a very important sentencing purpose in relation to offences against the *EP Act*. As Keogh J explained in the case of *DPP v Hazelwood Pacific Pty Ltd & Ors*:

> It is necessary that the sentence draw attention to the importance the *EP Act* places on the protection of the environment, and those enjoying it, from pollution and send a message to those engaged in commercial or industrial undertakings, or the occupiers of land on which such undertakings are conducted, that emission of pollution will attract significant punishment.[52]

112 The Director submitted that charge 1 'represents a blatant and deliberate disregard of the licence conditions, and is therefore a very serious contravention'. The Director further submitted that 'the amount of liquid waste being stored in breach of the licence conditions increased the size and severity of the fire and its adverse impact on the environment'.[53]

113 Bradbury disputed this characterisation and pointed out that it is not part of the agreed summary. As noted above, an agreed factual summary plays an important role in a proceeding such as this as it provides a defendant with the certainty of knowing the factual basis upon which they will be sentenced.[54]

114 Bradbury further submitted that the circumstances in which it came to exceed the permitted volume of waste were 'well known to the EPA'. The excess waste was moved to the Thornycroft Street premises as a consequence of a statutory notice

[51] *DPP v Hazelwood Pacific Pty Ltd & Ors* [2020] VSC 279, [104], [106], [128].
[52] *DPP v Hazelwood Pacific Pty Ltd & Ors* [2020] VSC 279, [154]; see also [18].
[53] Director's Sentencing Submissions dated 6 June 2023, [59].
[54] *DPP v Walsh* [2018] VSCA 172, [72].

issued by WorkSafe. There was an absence of facilities in Victoria which could store the product.[55]

115 I note that Mr Palmer KC and Ms Brown did not challenge any of these submissions.

116 In circumstances in which the exact amount by which the threshold was exceeded is unknown and there is an explanation before the court as to why the condition was breached, I consider this to be a lower level breach of s 27(2) of the EP Act.

117 Charge 2 and 3 are both related to the fire on 5 April 2019 described earlier in these reasons.

118 Charge 2 alleges that Bradbury polluted waters contrary to s 39(1)(c) of the EP Act. The pollution consisted of contaminated fire-water that escaped from the premises when the fire brigade was extinguishing the fire. The water contained chemical residue which had a distinctive chemical smell.

119 The 'water' polluted was Merlynston Creek. Samples were taken at four downstream sites in the Creek by EPA officers. The impact was limited to the first two sites.

120 The first site was Foden Reserve, a concrete retarding basin designed to intercept stormwater pollutants.

121 The second site was Merlynston Creek at Railway Bridge. This site is a 'degraded urban waterway which has been subject [to] severe and repeated polluting events since the 1970s'. According to Mr Leahy, Associate Principal Expert for Inland Water at the EPA, the area 'is of ecological value in that it is suitable to sustain aquatic life such as fish, insects and worms'.[56] There is no evidence of such life

[55] Outline of Defendant's Plea Submissions dated 12 June 2023, [75].
[56] Summary of Facts, [13] (Exhibit P2).

being harmed by the pollution. Nor is there any evidence of the duration of the impact.

122 Charge 3 also relates to the fire. Bradbury is charged that it caused or permitted an 'environmental hazard'[57] contrary to s 27A(1)(c) of the EP Act.

123 The conduct which is identified in the particulars to the charge is the decanting of Toluene which 'created a risk of fire at the premises'. The particulars state that this risk in turn 'carried with it a risk of toxic output in the form of water running from the premises into the environment, and thereby created a state of danger to the environment'.

124 There is clearly considerable overlap between charges 2 and 3. There is also some overlap between charge 3 and the OHS Act charge discussed earlier in these reasons.

125 The sentencing principle of totality is important in this context. It requires a sentencing judge 'who has passed a series of offences … to review the aggregate sentence and consider whether the aggregate is "just and appropriate"'. The ultimate penalty must be appropriate having regard to the 'totality of the criminal behaviour'.[58]

126 The Court was referred by the parties to the case of *DPP v Hazelwood* in which the Supreme Court of Victoria imposed a fine of $95,000 (which was approximately 27% of the then maximum penalty of $346,464) in respect of a serious air pollution event which occurred over several weeks in the town of Morwell.

127 I accept the submissions of Bradbury that the present case is considerably less serious than that of *Hazelwood.*

[57] 'Environmental hazard' means 'a state of danger to human beings or the environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics' - see EP Act, s 4(1).
[58] *Mills v R* (1988) 166 CLR 59, 62-63.

128 Having regard to the principle of totality, I consider that it is appropriate to impose an aggregate fine in respect of charges 2 and 3 as the charges arise from the same facts.[59]

Matters in Mitigation

129 Bradbury relied on three matters in mitigation of penalty.

130 First, its pleas of guilty are of considerable utilitarian benefit and are some evidence of remorse. The time of prosecutors and courts has been saved. The trials in these cases would have been lengthy and complex. The witnesses, especially the employees, have been spared the ordeal of reliving their experiences of the fire. For this Bradbury is entitled to a significant discount on sentence. This is especially so having regard to the ongoing delays occasioned by the pandemic.[60]

131 Secondly, Bradbury has no prior convictions and there has been no subsequent offending.

132 The third matter relied upon by Bradbury is its financial status. According to written submissions filed on its behalf, Bradbury is in liquidation and is in the process of being wound up. A 'Summary of Receipts and Payments' prepared by the liquidator and provided to the court reveals a balance of $9,053.20 in the liquidation bank account.

133 It is obvious that there is no real prospect of any fine imposed actually being paid by Bradbury.

134 I note that Mr Palmer and Ms Brown conceded that there is no suggestion in this case that the company has gone into liquidation to deliberately avoid paying the fine as sometimes occurs.

[59] *Sentencing Act 1991* (Vic), s 51.
[60] *Worboyes v The Queen* [2021] VSCA 169.

135 The court was provided with a number of cases where companies in liquidation have been fined for offending such as the offending with which Bradbury is charged.[61]

136 The accepted approach to sentencing in such situations appears to be that explained in the case of *DPP v Concord Group Pty Ltd* by his Honour Judge Lyon of this court following the approach taken by Teague J of the Supreme Court of Victoria in an earlier case. In his reasons for sentence, Judge Lyon explained that:

> The sentencing principles in relation to these matters are clear and settled. First, notwithstanding the company is now in liquidation, I take account of the decision of Teague J in *R v Denbo Pty Ltd*. In that decision, Justice Teague proposed to fix a fine at the amount which would have been appropriate if the company had remained as thriving as it appeared to have been at the time of the contravention of the duty. But otherwise, the fine must reflect the need to take into account normal sentencing principles. In other words, I take from *Denbo* that I am to ignore the fact that the company is in liquidation and the fine will never be paid.[62]

137 Although not articulated quite so clearly in some of the other cases to which the Court was referred, the results in those cases appear to suggest the same approach was followed. Consistently with those cases, I have sought to give effect to the same principles in respect of the fines I have imposed.

Orders

138 Taking all of the above matters into account, including the maximum penalties, the objective gravity, victim impact and the matters in mitigation, I make the following orders on indictment **C2114449.1**:

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[61] The cases to which the court was referred are *DPP v Concord Group Pty Ltd* [2019] VCC 1846; *R v AAA Auscarts Imports Pty Ltd* [2013] VCC; *DPP v Fergusson* [2017] VCC 1276; *DPP v Australian Box Recycling Proprietary Limited* [2016] VCC 1056; *Global Renewable Energy Solutions Pty Ltd (in liquidation)* (Werribee Magistrates' Court – 11 October 2021); *Concorp Group Pty Ltd (in liquidation)* (Melbourne County Court – 8 November 2019); and *CK Crouch Pty Ltd (in liquidation)* (Geelong Magistrates' Court – 11 September 2017).
[62] *DPP v Concord Group Pty Ltd* [2019] VCC 1846, [28].

(a) On charge 1, failing to take reasonable precautions for the prevention of fire or explosion, Bradbury is convicted and fined $600,000;

(b) On charges 2-4, failing to take reasonable precautions for the prevention of fire or explosion, Bradbury is convicted and fined an aggregate of $1,200,000;

(c) On charge 5, failing to take reasonable precautions for the prevention of fire or explosion, Bradbury is convicted and fined $600,000;

(d) On charge 6, failing to provide a safe working environment, Bradbury is convicted and fined $500,000.

139 I make the following orders on indictment **L10799199**:

(a) On charge 1, contravening a licence condition, Bradbury is convicted and fined $30,000;

(b) On charges 2 and 3, polluting waters and causing or permitting an environmental hazard, Bradbury is convicted and fined an aggregate of $50,000.

140 The Total Effective Fine imposed is $2,980,000.

141 Pursuant to s 6AAA of the *Sentencing Act 1991* (Vic), I indicate that, but for the plea of guilty, the fine imposed in this case would have been $4,000,000.